United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 77-7209

To be argued by:
RONALD E. STERNBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IRVING ELLENTUCK, et al.,

Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN, et al.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

MUNICIPAL APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

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Sworn to before me, this 22 day of July 1977

Edward Clark

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IRVING ELLENTUCK, et al.,

Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN, et al.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK,

----------x

MUNICIPAL APPELLEES' BRIEF

Preliminary Statement

Appellants appeal from a judgment of the District Court for the Southern District of New York (PIERCE, D.J.), entered April 4, 1977, which dismissed their amended complaint, with prejudice (54A).* In his opinion, dated March 31, 1977, Judge Pierce held that appellants' action, brought pursuant to 42 U.S.C. §§ 1983 and 1985, was barred by prior proceedings in the administrative tribunals and courts of the State of New York (41A-53A).

Question Presented

Is this action barred by prior litigation between the parties in the courts of the State of New York?

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*Numbers in parentheses refer to pages of the Joint Appendix.

Facts

On or about June 30, 1972, defendant-appellee Kimball Construction Co., Inc. (hereinafter "Kimball"), the owner of a three story and basement wood frame building located at 131-16 Rockaway Beach Boulevard in the Borough of Queens (5A, 6A), filed plans and specifications with the Department of Buildings in order to obtain a permit to convert the premises to a class A multiple dwelling (10A). These plans were approved and, on or about November 8, 1972, the requested permit was issued (10A).

Shortly thereafter, adjoining landowners, through the Belle Harbor Property Owners Association, sought to have the permit revoked. Following several communications with defendants-appellees H. Irving Sigman, Borough Superintendent of Buildings for the Borough of Queens, and Joseph Stein, Commissioner of Buildings of the City of New York, the request to revoke the permit was denied (11A). Following this refusal, the adjoining landowners commenced an action in the New York Supreme Court, Queens County, in which they sought a judgment declaring the permit and the alteration pursuant to it illegal, vacating the permit, and enjoining and restraining Kimball Construction Co., Inc., from altering the premises (11A-12A, 68A-81A). All of the named plaintiffs in the instant action, save two (Mark R. and Roberta Bryce) were plaintiffs in the Supreme Court action, and the defendants in the latter action are among the defendants named in this action (3A, 68A).

The Supreme Court denied an application for a temporary injunction enjoining Kimball from proceeding with construction, and, on July 2, 1973, a judgment dismissing the plaintiffs' action on the merits was entered (12A-13A). The plaintiffs then appealed to the Appellate Division of the Supreme Court, Second Department (13A). On or about March 13, 1974, after the appeal had been argued, but prior to a decision, Kimball completed conversion of the building and received a certificate of occupancy for the premises as a Class A multiple dwelling (14A-15A).

In an order entered April 29, 1974, the Appellate Division reversed the trial court, adjudged the permit null and void and the alteration pursuant to it illegal, vacated the permit and enjoined Kimball from altering the building to a Class A multiple dwelling (57A-58A). In its opinion, dated April 29, 1974, the Appellate Division held that, although the subject premises had been registered in 1946 as a Class B multiple dwelling, that classification had been abandoned by the previous owners of the building, the Sisters of Reparation of the Congregation of Mary, Inc. The Sisters had used the building as a convent and home for homeless and/or aged women, a conforming usage under the R-2 classification (single family detached dwellings) for which the district had been zoned pursuant to the Zoning Resolution effective December, 1961. The Court concluded, therefore, that the permit to alter the building to a Class

A multiple dwelling, a nonconforming use, should not have been granted (55A-56A). Ellentuck v. Stein, 44 AD 2d 714 (2d Dept. 1974).

In accordance with the decision of the Appellate Division, defendant-appellee Jeremiah T. Walsh, who had succeeded Stein as Commissioner of Buildings, directed Sigman to apply to the Board of Standards and Appeals of the City of New York (hereinafter "BSA") for a revocation of the certificate of occupancy (99A). Following a series of hearings on the question, the certificate was revoked by the BSA on or about October 1, 1974 (15A-16A, 103A).

Thereafter, Kimball filed with the BSA an application for a variance, on the ground of hardship under Section 72-21 of the Zoning Resolution of the City of New York, to permit the maintenance and operation of the building as a Class A multiple dwelling (21A). After holding hearings on the question, the BSA, by resolution dated March 25, 1975, granted the requested variance, "to permit in an R2 district, the maintenance of an existing four-story building as a multiple dwelling" (27A, 113A).*

Following the BSA's decision, all of the named plaintiffs in this action, save two (Kevin P. and Margaret Wilkinson), commenced a proceeding,

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*Philip Augusta, Henry M. Carroll and John J. Walsh (incorrectly named in the complaint as John P. Walsh), named as defendants in their individual as well as official capacities, voted in favor of the variance. Howard B. Hornstein voted against the variance, and Joseph B. Klein did not vote. The latter two commissioners have been sued solely in their official capacities.

pursuant to Article 78 of the New York Civil Practice Law and Rules, to review the determination (29A). All of the respondents in that proceeding are also defendants in the instant action (3A, 82A). The petitioners in the Article 78 proceeding sought judgment revoking and vacating the decision of the BSA granting the variance, enjoining respondents from reinstating the revoked certificate of occupancy, and adjudging the members of the BSA who voted in favor of the variance to be in contempt of court on the ground that they had violated the order of the Appellate Division entered in the prior action in which the original permit had been successfully challenged (82A-97A). Pursuant to Article 78, the proceeding was transferred to the Appellate Division, Second Department (30A).

By order dated March 1, 1976, the Appellate Division confirmed the determination of the BSA and dismissed the proceeding on the merits (61A-62A). In its opinion, dated January 30, 1976, the court confirmed the BSA's finding that Kimball was entitled to relief from "unnecessary hardship". The court also held that its decision in the earlier case was based solely upon the propriety of the issuance of the alteration permit; it did not foreclose the BSA from thereafter granting a variance to Kimball (59A-60A). Ellentuck v. Klein, 51 AD 2d 964 (2d Dept. 1976).

Asserting that there were constitutional questions involved, the Article 78 petitioners filed a notice

of appeal as of right to the New York Court of Appeals from the order of the Appellate Division. Kimball then moved to dismiss the appeal on the ground that constitutional questions were not directly involved (31A). While the appeal was pending, petitioners discovered that the Hon. Henry J. Latham, one of the Appellate Division justices who had participated in the decision confirming the BSA's determination, was a trustee of the respondent-appellee Richmond Hill Savings Bank, which had intervened in the BSA proceeding. The Bank was mortgagee on the Kimball mortgage for the building in question, and it had represented to the BSA that it would be irreparably damaged if the variance was not granted (31A-32A, 119A-120A). Petitioners thereupon filed with the Court of Appeals an affidavit detailing Justice Latham's relationship to the Bank, contending that, because of the relationship, Justice Latham's participation in the decision rendered it void (32A).

The Court of Appeals thereafter granted Kimball's motion, and, in an order entered April 6, 1976, dismissed the appeal "upon the ground that no substantial constitutional issue [was] directly involved" (32A, 63A). Ellentuck v. Klein, 39 NY 2d 743 (1976). Petitioners then moved in the Court of Appeals for leave to appeal on a number of grounds, including the alleged nullity of the Appellate Division order (32A). The motion was denied in an order entered May 6, 1976 (32A, 66A). Ellentuck v. Klein, 39 NY 2d 707 (1976).

Petitioners also moved in the Appellate Division for an order vacating and declaring null and void, on the ground of Justice Latham's alleged disqualifying interest, the order confirming the BSA's determination (33A). The Appellate Division granted petitioners' motion to the extent of permitting reargument and reconsideration, and, upon reargument, the court, in an order entered April 27, 1976, adhered to its previous decision. Justice Latham did not vote (33A, 64A-65A). Petitioners then filed a notice of appeal as of right from the April 27 order of the Appellate Division, specifically challenging the propriety of Justice Latham's participation in the proceedings. This appeal was dismissed by the Court of Appeals, sua sponte, upon the ground that no substantial constitutional question was directly involved (48A). Ellentuck v. Klein, 40 NY 2d 844 (1976).

On or about May 5, 1976, Kimball entered judgment in its favor in the Article 78 proceeding confirming the March 25, 1975, decision of the BSA granting Kimball the requested variance. Petitioners then moved to vacate that judgment, which motion was denied by defendant-appellee the Hon. Alfred D. Lerner, Supreme Court, Queens County, in an order entered July 23, 1976. The court said: "The decisions upon which this judgment is predicated, having been reviewed by the Court of Appeals, are binding upon this court and leave it no discretion whatever in the matter" (34A, 67A).

In the instant action, plaintiffs sue on behalf

of themselves and other adjoining landowners who objected to the granting of the variance by the BSA. Four causes of action under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, are alleged; jurisdiction is alleged pursuant to 28 U.S.C. §§ 1343, 2201 and 2202 (4A). In the first cause of action against Kimball Construction Co., Inc., John and Marie Kimball, Joseph Stein, H. Irving Sigman and Erling Karlsen, plaintiffs seek damages of $1,000,000, allegedly incurred as a result of a conspiracy among those defendants to deprive plaintiffs of various constitutional rights by virtue of the granting of the original permit to Kimball (4A-17A, 38A).

In the second cause of action against Philip Augusta, Henry M. Carrol, John J. Walsh, the Richmond Hill Savings Bank, Julius Granirer, Kimball Construction Co., Inc., and John and Marie Kimball, plaintiffs seek damages of $1,000,000 allegedly incurred as a result of a conspiracy among those defendants to deprive plaintiffs of various constitutional rights by the granting of the variance to Kimball. Plaintiffs also seek both a declaratory judgment declaring the determination of the BSA granting the variance to be null and void and a permanent injunction enjoining and restraining the maintenance of the premises as a Class A multiple dwelling (17A-29A, 39A).

In the third cause of action against the Justices of the Supreme Court, Appellate Division, Second Department,

and Justice Alfred D. Lerner, as a judge of the Supreme Court, Queens County, plaintiffs seek a declaratory judgment declaring the various decisions, orders and judgments described supra to be null, void and of no force or effect (29A-35A, 39A). In the fourth cause of action against the Board of Standards and Appeals of the City of New York, plaintiffs seek judgment declaring unconstitutional various sections of the New York City Charter, Administrative Code and Zoning Resolution and the rules and regulations of the BSA, insofar as each allegedly permits the deprivation of valuable property rights without due process of law (35A-38A, 39A-40A). *

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*Defendants-appellees Philip Augusta, Henry M. Carroll and John J. Walsh were sued individually and, together with Joseph B. Klein and Howard B. Hornstein, as commissioners constituting the Board of Standards and Appeals. Jeremiah T. Walsh was sued in his official capacity as Commissioner of Buildings of the City of New York. H. Irving Sigman was sued individually and in his official capacity as Borough Superintendent for the Department of Buildings for the Borough of Queens. Erling Karlsen was sued individually and in his official capacity as an Inspector for the Department of Buildings, Borough of Queens; he is now deceased. Joseph Stein was sued in his official capacity as the former Commissioner of Buildings of the City of New York; he has since left the jurisdiction, and he was not served in this action (Appellants' Brief, pp. 7-8).

Stein, Sigman and Karlsen were among the defendants in the action, described supra, challenging the granting of the original permit to Kimball. Klein, Augusta, Hornstein, Carroll, John J. Walsh, Jeremiah T. Walsh and Sigman were among the respondents named in the Article 78 proceeding, described supra, challenging the determination of the BSA granting the variance to Kimball.

This brief is submitted on behalf of these defendants-appellees, hereinafter referred to as the municipal appellees (or defendants).

The municipal defendants moved, pursuant to F.R. Civ. P., Rule 12(b), to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted, that the action was barred by the doctrines of res judicata and collateral estoppel, and that the court lacked subject matter jurisdiction. The other defendants also moved to dismiss the complaint. In an order entered April 7, 1977, the District Court (PIERCE, D.J.) granted the motions and dismissed the complaint in its entirety, with prejudice (54A).

Decision Below

In dismissing the complaint, Judge Pierce held that this action was barred by the determinations in the previous state court proceedings. The issues raised in this action, he said, were "addressed and finally adjudicated" in the state courts; having made their choice of forum, plaintiffs could not now try for a "'second bite of the cherry'" (50A). He continued (51A-53A; footnote omitted):

> "A state court litigant cannot avoid the effects of res judicata and collateral estoppel by casting a previously adjudicated claim, or a claim which could have been adjudicated in the prior action, in the mold of a claim under the civil rights acts. Bricker v. Crane, 468 F. 2d 1228, 1231-32 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973); see Katz v. Connecticut, 433 F. 2d 878 (2d Cir. 1970) (per curiam). Moreover, allowing unsuccessful state court litigants to use the civil rights act as a vehicle to escape the consequences of that prior determination is

a blunt and unnecessary affront to the state legal system. See Tang [v. Appellate Division of NY Supreme Court, First Department, 487 F. 2d 138, 143 (2d Cir. 1973)]. This principle is particularly apposite here in light of plaintiffs' relentless pursuit of relief in state court.

"The New York State Courts have squarely confronted each of the constitutional claims now raised by the plaintiffs in this forum. Since the New York Court of Appeals dismissed two of plaintiffs' appeals on the ground that they presented no substantial constitutional question, it is frivolous for plaintiffs to suggest that the constitutionality of the actions of each of the twenty-two defendants herein was not adjudicated by the state courts. The fact that the Court of Appeals rendered no opinion on the matter does not alter this result. Grubb v. Public Utilities Commission, 281 U.S. 470, 477-78 (1930); Lecci v. Cahn, 493 F. 2d 826, 830 (2d Cir. 1974).

"It is equally clear that the issue of Justice Latham's alleged disqualifying interest was a matter considered and resolved by the New York Court of Appeals. This issue was before the Appellate Division on reargument and was thrice placed squarely before New York State's highest court. The Court of Appeals' dismissal of each of plaintiffs' appeals constituted an explicit rejection of plaintiffs' application to vacate the decision of the Appellate Division. Under the circumstances of this case, these dismissals were adjudications on the merits which render the matters that were the subject of those appeals inappropriate for renewed consideration here. See Lecci v. Cahn, supra.

"An examination of each of the four counts of the amended complaint demonstrates that what plaintiffs in fact seek here is further appellate review of the decisions of the state tribunals. The United States Supreme Court has ruled, and the lower federal courts repeatedly have held, that a federal district court lacks the power

to review finally adjudicated state court determinations of constitutional claims. Rooker v. Fidelity Trust Co., 263 U.S. 413 (9923); Duke v. State of Texas, 477 F. 2d 244, 253 (5th Cir. 1973); Louis Ender, Inc. v. General Foods Corp., 467 F. 2d 327 (2d Cir. 1972); Anderson v. Lekon Properties, Inc., 457 F. 2d 929 (8th Cir. 1972) (per curiam); Sreter v. Hynes, 419 F. Supp. 546 E.D.N.Y. 1976) (Pratt, J.).

> 'The proper procedure for [plaintiffs] to follow in order to indicate what [they] assert to be [their] constitutional rights was to appeal the decision of the state courts to the Supreme Court. Absent such an appeal the constitutional issues were conclusively determined against [plaintiffs].' Louis Ender, Inc., supra, 467 F. 2d at 332)"

ARGUMENT

WITH THE POSSIBLE EXCEPTION OF THE BRYCE AND WILKINSON PLAINTIFFS, THIS ACTION IS BARRED FOR ALL PURPOSES BY THE PRIOR LITIGATION IN THE COURTS OF THE STATE OF NEW YORK.
EVEN AS TO THE BRYCE AND WILKINSON PLAINTIFFS, AT LEAST CERTAIN OF THE CAUSES OF ACTION ALLEGED IN THIS ACTION ARE BARRED BY THE PRIOR LITIGATION, AND, IN ANY EVENT, THEIR CIVIL RIGHTS CLAIMS ARE ENTIRELY FRIVOLOUS.

As noted supra, pages 2 and 4, the plaintiffs Mark R. and Roberta Bryce were not parties to the state court action challenging the initial issuance of the permit to Kimball, and the plaintiffs Kevin P. and Margaret Wilkinson were not parties to the Article 78 proceeding challenging the BSA's grant to Kimball of the variance. However, neither the District Court's opinion nor appellants' brief to this Court mentions this fact of less than complete identity of parties in the three proceedings. While this may be because, factually, all of the plaintiffs participated sufficiently in both state proceedings to be bound by them, in the second subpoint of this argument the claims of those plaintiffs as to whom there is less than complete identity are discussed. Before that, the issue of res judicata or claim preclusion as to those of the plaintiffs who were both plaintiffs and petitioners in the earlier state proceedings is discussed.

(1)

It is well established that a party may not seek relitigation in the federal courts of constitutional issues previously litigated and determined in state courts. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930); Katz v. State of Connecticut, 433 F. 2d 878 (2d Cir. 1970); Lackawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2d Cir. 1971)(per curiam); Tang v. Appellate Division of the New York Supreme Court, First Department, 487 F. 2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974); Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Mitchell v. National Broadcasting Co., Civil No. 76-7376 (2d Cir., April 6, 1977, Sept. 1976 Term, p. 2715); Turco v. Monroe County Bar Association, Civil No. 76-7380 (2d Cir., April 21, 1977, Sept. 1976 Term, p. 3109). Even a cursory comparison of appellants' complaint in the instant action with the pleadings and other papers submitted in the various prior state court proceedings demonstrates conclusively that, with the exception of vague and conclusory allegations of conspiracy, the issues raised herein have been fully and finally adjudicated by the courts of the State of New York.

Appellants' first and second causes of action allege conspiracies on the part of appellees to deprive

appellants of various constitutional rights by virtue of the issuing to Kimball of a permit and then a variance authorizing the conversion of the premises in question into a Class A multiple dwelling. Aside from the allegations of conspiracy, almost every substantive paragraph in these two causes of action has a counterpart in the complaints filed in the action challenging the validity of the permit and the Article 78 proceeding to review the determination of the Board of Standards and Appeals granting the variance (compare 6A-29A with 76A-80A and 85A-96A).

The issuance of the permit to Kimball was the basis for the initial state court action commenced by appellants. In that action, the Appellate Division, Second Department, reversed the trial court's determination that the permit was valid. The decision was not appealed, and the certificate of occupancy which had been issued to Kimball was revoked by the BSA. Appellants now claim, despite their admission that the first cause of action "arises out of matters that were fully litigated between the parties" (Appellants' Brief, p. 6), that the issues can be relitigated on the basis of the new gloss of conspiracy. As discussed infra, pp. 17-18, appellants' conspiracy allegations do not suffice to provide access to the federal courts.

In the second cause of action, appellants are clearly attempting to relitigate the issue of the BSA's determination granting Kimball a variance. This question

was decided against appellants by the Appellate Division, Second Department, and, on three separate occasions, the New York Court of Appeals refused to review the Appellate Division's orders. Thus, although the issue was conclusively determined against them by the New York courts,* appellants contend that the BSA's determination can now be reviewed by the federal courts. They allege in their complaint, and argue in their brief, that the BSA was not authorized to issue the variance, precisely the question raised and determined in the Article 78 proceeding (see 82A ff). In an incredible display of circuitous reasoning, however, appellants maintain that the confirmation of the BSA's determination by the Appellate Division "is itself void because even an Appellate Court cannot make valid that which is absolutely void by prohibition of law " (Appellants' Brief, p. 26). Appellants thereby ignore the fact that the Appellate Division perforce determined that the BSA had acted within its authority in granting the variance, and that, absent reversal of that decision by a higher appellate court, it is binding upon appellants. See Rooker v.

*See Affidavit of Assistant Corporation Counsel Angelo Aiosa in support of Motion to Dismiss Amended Complaint, paragraph 9 and exhibits annexed thereto, Docket Entry No. 7 in the District Court (hereinafter referred to as "Aiosa Affidavit").

Fidelity Trust Co., supra, 263 U.S. at 415.*

It is apparent that the issues which appellants seek to litigate in the first two causes of action have, on several occasions, been determined by the New York courts. Despite this identity of issues and parties, however, appellants maintain that their claims can now be relitigated in the federal courts on the basis of the added gloss of conspiracy. This contention is clearly untenable.

By virtue of alleging that conspiracies existed among the appellees, appellants have attempted to bring themslves within this Court's policy of favoring the federal forum for the litigation of claims under the Civil Rights Act. See Lombard v. Board of Education of the City of New York, 502 F. 2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); Newman v. Board of Education of the City School District of NY, 508 F. 2d 277 (2d Cir.); cert. denied, 420 U.S. 1004 (1975). That policy, however, clearly does not contemplate causes of action such as those in question.

Appellants have done no more in the first two causes of action than recite the history of their state

*Perhaps realizing the weakness of this position, appellants also contend, in their third cause of action, that the Appellate Division's orders are void because of the participation of an allegedly disqualified judge. It is clear, however, from the recitation of the facts, supra, and the District Court so held, that this issue was presented to, and resolved by, the New York courts, including the Court of Appeals; appellants are therefore barred from raising it in the federal courts. See infra, pp. 20-21; Aiosa Affidavit, paragraph 7 and exhibit annexed thereto.

court proceedings, interspersing within the narrative utterly unsubstantiated general allegations of conspiracy. This Court is particularly wary of "vague and conclusory allegations respecting the existence of a conspiracy." Powell v. Workmen's Compensation Board of the State of NY, 327 F. 2d 131, 137 (2d Cir. 1964). Such allegations cannot serve to bring otherwise barred claims before the federal courts. If appellants' claims are held to be within the jurisdiction of the District Court, the door will be opened for every party in a state proceeding who is dissatisfied with the result to file a complaint in the federal courts reciting the history of his state case and concluding with a general allegation of conspiracy. Cf. Powell v. Workmen's Compensation Board, id. Since it is not the intent of the Civil Rights Act to foster "career litigants" (Thistlethwaite v. City of New York, supra, 497 F. 2d at 342), it is submitted that appellants' conspiracy allegations do not serve to confer jurisdiction on the District Court which the Court would not otherwise have. See P I Enterprises, Inc. v. Cataldo, 457 F. 2d 1012, 1015 (1st Cir. 1972) ("A complaint under the Civil Rights Act does not provide the springboard for an unhappy state litigant to raise his federal claims de novo in federal court."); Bricker v. Crane, 468 F. 2d 1228, 1231 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973) ("...[T]he effects of collateral estoppel cannot be avoided by recasting an adjudicated issue in the form of an action under the Civil Rights Act.").

In their fourth cause of action, appellants seek a judgment declaring unconstitutional various sections of the New York City Charter, Administrative Code and Zoning Resolution, and the rules and regulations of the BSA, insofar as each allegedly permits the deprivation of valuable property rights without due process of law. Appellants contend that, pursuant to these provisions, "the hearings on the Kimball variance were conducted so informally as to violate all the fundamental principles of due process" (35A-36A).

Appellants are barred from raising these issues in federal court by virtue of the indisputable fact that these allegations of lack of due process were previously raised in the Article 78 proceeding. In their brief in the Appellate Division, and again in their brief in support of their motion for leave to appeal to the Court of Appeals, appellants vigorously urged virtually identical due process contentions as they raise in this action. See Aiosa Affidavit, paragraph 8, and exhibits annexed thereto. Those claims having been before the New York courts, appellants are not now entitled to "a second bite of the cherry". Lackawanna Police Benevolent Association v. Balen, supra, 446 F. 2d at 53.

What appellants in fact are seeking in this action is further appellate review of the decisions of the state tribunals. It is well established, however, that the District Court lacks jurisdiction to review state court determinations of federal constitutional issues; no United States court other than the Supreme Court can entertain a proceeding to review or modify state court determinations. Rooker v. Fidelity Trust Co., supra, 263 U.S. at 416; see also Coogan v. Cincinnati Bar Association, 431 F. 2d 1209, 1211 (6th Cir. 1970); Tang v. Appellate Division, supra, 487 F. 2d at 141; Lecci v. Cahn, supra, 493 F. 2d at 829.

Appellants, however, seek to avoid the obvious application of these principles to the instant action in a series of boot-strap arguments to the effect that the New York Court of Appeals, and therefore the Supreme Court, lacked jurisdiction to entertain the constitutional issues raised by appellants (Appellants' Brief, pp. 33-39). Appellants' characterization of the proceedings notwithstanding, the New York courts were not burdened by the same doubts as to their jurisdiction.

The question of Justice Latham's participation in the Appellate Division's decision in the Article 78 proceeding was before the New York Court of Appeals on three separate occasions. Appellants first appealed as of right from the Appellate Division's confirmation of the BSA's determination, arguing, inter alia, that Justice Latham's participation voided the Appellate Division's order.

The Court of Appeals dismissed the appeal on the ground that no substantial constitutional issue was directly involved. The Court, with full knowledge of Justice Latham's participation, also denied appellants' motion for leave to appeal. Following the Appellate Division's affirmation of its prior determination, appellants again appealed to the Court of Appeals as of right, and, again, despite the contention that Justice Latham's participation voided the order, the Court dismissed the appeal, sua sponte, on the ground that no substantial constitutional issue was directly involved. In light of these determinations, appellants' statement that "the issue of whether Justice Latham was disqualified for interest has never been properly before any court and has never been litigated" (Appellants' Brief, p. 38), is a gross distortion of what occurred during the state court proceedings.

Similarly, as noted supra, p. 15, appellants argue that, since the BSA lacked the authority to grant the variance, the Appellate Division could not confirm the BSA determination. Obviously, however, despite appellants' characterization of the BSA's determination, the Appellate Division was of the opinion that the BSA had acted within its jurisdiction, and appellants cannot now ask the federal courts to sit as appellate courts to review the decisions of the state courts. As recently noted by

this Court:

> "...[U]nlike the federal habeas corpus statutes, the federal civil rights acts do not provide for collateral review of state court judgments. Federal courts do not sit to review the determination of state courts." Mitchell v. National Broadcasting Co., supra, Civil No. 76-7376, slip opinion at 2729-2730.

Finally, as has been noted throughout this brief, all of appellants' constitutional claims (with the exception of the alleged conspiracies, discussed supra, pp. 17-18) have previously been presented to the New York courts. Apparently those courts did not have any doubts as to their jurisdiction to review the questions raised by appellants. However, even if these constitutional claims were improperly raised in an Article 78 proceeding, the New York Court of Appeals has held that, by the simple expedient of treating the proceeding as an action for a declaratory judgment, constitutional issues can be adjudicated. The courts "should not become involved in drawing fine lines of distinction in characterizing the form in which relief is sought"; if a cause for complaint has been stated, the proper form of action or proceeding can be molded by the court. Matter of Kovarsky v. Housing and Development Administration, 31 NY 2d 184, 192-193 (1972).

Whether the bar in the instant case is categorized as "res judicata," "comity," "collateral estoppel," "claim preclusion" or any other label is immaterial. See Paddington East Enterprises, Inc. v. Roth, 70 FRD 458, 460,

n. 2 (SDNY 1975). Following appellants' "relentless pursuit of relief in state court," their use of the Civil Rights Act "as a vehicle to escape the consequences of that prior determination" was properly characterized by the District Court as "a blunt and unnecessary affront to the state legal system" (51A). The prior state court determinations bar the instant action, and, therefore, the District Court's dismissal of the complaint in its entirety, with prejudice, was, in all respects, proper.

(2)

(a)

Despite the fact that there is less than complete identity between the named appellants in the instant action and the named plaintiffs and petitioners in the prior state proceedings, it is submitted that those proceedings bar the instant action with respect to all of the appellants. The issue of non-identity was not even raised in the District Court by any of the parties, and Judge Pierce's decision necessarily rests on his implicit recognition that the parties in this action and in the state proceedings are, in reality, the same. Indeed, appellants themselves recognize and admit this identity. In their brief, page 6, appellants state that the parties in the state action challenging the legality of the permit issued to Kimball were the same as the parties in the instant action. Further, in their complaint, paragraph 142 (31A), appellants state that they were the petitioners in the Article 78

proceeding challenging the BSA's granting of the variance to Kimball.

Appellants should be held bound by their own characterization of the parties in the various actions. Given this recognition of the practical identity of the parties by both the District Court and the appellants, this Court should affirm the dismissal of the complaint in this action on the ground that it is barred by virtue of the prior state court proceedings.

(b)

Should this Court hold that the plaintiffs who we not named in the state proceedings are not barred from bringing this action, it is submitted that the dismissal of the complaint must still be affirmed.

Mark R. and Roberta Bryce were petitioners in the Article 78 proceeding, and they are thus barred from bringing the second, third and fourth causes of action herein alleged (see supra, subpoint 1). With respect to the first cause of action, which involves the granting of the permit to Kimball, damage to the Bryces is virtually nonexistent. In the state action challenging the legality of the permit, the Appellate Division, Second Department, held that the permit was null and void and ordered that it be vacated (55A-58A). Despite this total absence of damage resulting from the issuance of

the permit, the Bryces allege that they were the victims of a conspiracy to deny them certain constitutional rights. This claim, however, is so utterly frivolous as to warrant dismissal. The vague, conclusory and completely unsubstantiated allegations of conspiracy, seemingly woven out of whole cloth, cannot serve to bring the first cause of action within the ambit of the Civil Rights Act and the jurisdiction of the District Court. Powell v. Workmen's Compensation Board of the State of New York, 327 F. 2d 131 (2d Cir. 1964), in which plaintiff was represented by the same attorney who represents appellants herein, is conclusive on this point and requires the dismissal of the first cause of action with respect to the Bryce plaintiffs.

Kevin P. and Margaret Wilkinson were plaintiffs in the state action challenging the legality of the permit, and they are thus barred from bringing the first cause of action alleged in the instant action (see supra, subpoint 1). With respect to the second cause of action, Powell again mandates its dismissal, since the vague and conclusory conspiracy allegations are no more than a poorly disguised smokescreen by virtue of which appellants hoped to secure federal jurisdiction to litigate their wholly state claims. The third cause of action alleges no discernable federal civil rights action against the justices of the Appellate Division, Second Department.

Finally, appellants allege a fourth cause of action against "the Board of Standards and Appeals of the City of New York" (35A). However, to the extent that a civil rights action can even be held to be alleged, the District Court lacks jurisdiction to entertain it, since the Board, an agency of the City, is not a "person" within the meaning of the Civil Rights Act. See City of Kenosha v. Bruno, 412 U.S. 507 (1973); Olson v. California Adult Authority, 423 F. 2d 1326 (9th Cir.), cert. denied, 398 U.S. 914 (1970); Vick v. Texas Employment Commission, 514 F. 2d 734, 737 (5th Cir. 1975); Edelberg v. Illinois Racing Board, 540 F. 2d 279, 281 n. 2 (7th Cir. 1976); Monell v. Department of Social Services of the City of New York, 532 F. 2d 259, 262-264 (2d Cir. 1976), cert. granted, -U.S.-, 97 S. Ct. 807 (1977); Surowitz v. New York City Employees' Retirement System, 376 F. Supp. 369, 371-372 (SDNY 1974). The dismissal of the complaint with respect to the Wilkinson plaintiffs should, therefore, be affirmed.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED, WITH COSTS.

July 18, 1977

Respectfully submitted,

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WITHIN IS HEREBY ADMITTED

THIS 21st DAY OF July, 1977

Attorney for

Appellants